

Reforming the International Trading System: The Tokyo Round Trade Negotiations in the Final Stage

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REFORMING THE INTERNATIONAL TRADING SYSTEM: THE TOKYO ROUND TRADE NEGOTIATIONS IN THE FINAL STAGE

Thomas R. Graham†

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INTRODUCTION

After five years of arduous negotiations among ninety-one countries, the Tokyo Round of multilateral trade negotiations (MTN)¹ entered its final phase in July 1978. The representatives of seventeen nations marked this turning point by publishing a Status Report on the negotiations.² Responding to the progress reflected in the publication of that report, seven chiefs of state conferring at the economic summit meeting in Bonn, West Germany, established a goal of completing the negotiations by the end of 1978.³

Issuance of the Status Report and the Bonn communiqué marked the beginning of the end of five years of protracted debate among ninety-one nations over tariffs, subsidies, customs procedures, government purchasing practices, and other problems of international trade. Even when the Status Report was issued, negotiators had yet to reach agreement on many of the most important issues, including special treatment for developing countries, lowering barriers to agricultural trade, new procedures for settling international trade disputes, completion of a balanced set of technical agreements, and domestic political acceptance and implementation of the commitments made by the negotiators. Thus, despite significant achievements, success in the Tokyo Round was far from assured in the summer of 1978.

The difficulty of reaching agreement on all the issues before the negotiators has been aggravated by adverse economic and political conditions in many of the participating nations during the course of the negotiations. Increased fuel costs contributed to simultaneous inflation and unemployment, which raised protectionist pressures in many industrialized nations.⁴ The governments of some participants, including the United States, held tenuous political majorities. And Japan's huge trade surpluses antagonized her

1. These negotiations will be referred to both as the "Tokyo Round" and as the "MTN." For background on the Tokyo Round, see Wolff, *The U.S. Mandate for Trade Negotiations*, 16 VA. J. INT'L L. 505 (1976).

2. Statement by Several Delegations on Current Status of Tokyo Round Negotiations, GATT Doc. MTN/INF/33 (July 13, 1978) (on file at the *Cornell International Law Journal*) [hereinafter cited as Status Report]. This Status Report was sponsored by the United States, the European Economic Community (Belgium, Denmark, France, Great Britain, Ireland, Italy, Luxembourg, the Netherlands, and West Germany), Canada, Japan, Switzerland, New Zealand, and Austria. Sweden and Norway concurred in the principles set forth in the Status Report, but did not sponsor the document.

3. Presidents Carter and Giscard d'Estaing and Prime Ministers Andreotti, Callaghan, Fukuda, Schmidt, and Trudeau attended the conference, which was held July 16-17, 1978. For a report on the summit meeting, including the text of the joint communiqué, see N.Y. Times, July 18, 1978, at 1, col. 4.

4. See Wall St. J., Mar. 23, 1977, at 44, col. 1 (citing examples of protectionist pressures being exerted in the United States).

trading partners, many of whom were incurring unprecedented trade deficits.

That the participating nations have stayed at the bargaining table throughout this period of international economic difficulties is at least partly attributable to the enormous importance of the negotiations. If successful, the Tokyo Round will recast the framework of accepted international trading rules and thereby play a pivotal role in refereeing international competition for markets in the 1980's. On the national level, success in the Tokyo Round would symbolize the willingness of governments to resist domestic protectionist pressures and would reestablish a basis for responding to worldwide economic problems with negotiation rather than "beggar your neighbor" mercantilism. On the individual level, success in the Tokyo Round would affect everyone in one way or another: as consumers, as workers, or merely as citizens subject to the vagaries of inflation and unemployment.

Issuance of the Status Report and the Bonn communiqué in July made this success more nearly possible. This Article examines where the Tokyo Round stands in the fall of 1978. The Epilogue will consider developments as the Article goes to press.

I

A BRIEF BACKGROUND

The General Agreement on Tariffs and Trade (GATT)⁵ is a body of rules formulated in 1947 to promote and maintain an open international trading system.⁶ Unlike some sets of international principles, the GATT rules have a significant day-to-day influence on government trade policy, because maintenance of the GATT system serves the self-interest of the contracting parties and because violators of the GATT rules risk lawful trade retaliation by other countries. The GATT Secretariat has sponsored periodic "rounds" of negotiations to promote international trade.⁷ Until re-

5. *Opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194. The Agreement has been modified in several respects since 1947. The current version is contained in 4 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969) [hereinafter cited without cross reference as GATT, 4 BISD].

6. The GATT rules were to have been one component of a more comprehensive International Trade Organization, which in turn was to have joined with the World Bank and the International Monetary Fund to form the pillars of the international economic system after World War II. When the International Trade Organization collapsed in 1949, principally because Congress failed to ratify the treaty establishing it, the GATT rules became the nucleus of a small international organization. For more complete background information about the GATT, see J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 35-57 (1969).

7. The first round after the formation of the GATT took place in 1949 at Annecy, France. The second round was held in 1951 at Torquay, England. The third, fourth, and fifth rounds took place in 1955, 1960-61, and 1962-67 at Geneva, Switzerland. See J. JACKSON, *supra* note 6, at 217-19. See also Rehm, *Developments in the Law and Institutions of Interna-*

cently, these multilateral negotiations have focused on the reciprocal lowering of tariff barriers.⁸ But beginning with the Kennedy Round of the mid-1960's, negotiators recognized that tariffs were less of an obstacle to international trade than more subtle "nontariff barriers."⁹ These barriers include Buy National government purchasing policies,¹⁰ exclusionary product standards or testing practices,¹¹ and duty assessment methods that artificially inflate import duties,¹² all of which were covered inadequately by the GATT rules in effect at that time. In addition, there was a growing belief that the GATT rules were outmoded or weak in several important areas: anticompetitive government subsidies, temporary import restrictions designed to aid beleaguered domestic industries, agricultural trade, the relation between export restrictions and access to vital supplies, emergency restrictions for improving the balance of payments, and procedures for settling international trade disputes.¹³

Other developments also indicated that fundamental adjustments were needed. The European Economic Community (EEC)¹⁴ emerged as a challenger to America's historic leadership in international trade, exercising strength approximately equal to that of the United States. The less developed countries used the United Nations Conference on Trade and Development (UNCTAD) as a forum from which they vigorously promoted their

tional Economic Relations: The Kennedy Round of Trade Negotiations, 62 AM. J. INT'L L. 403 (1968).

8. A typical round of tariff negotiations may require each participant to analyze the potential effects of reducing duty rates on several thousand products. Participants would have to weigh alternatives such as whether an American offer to reduce the duty rate from 10% to 6% on \$500 million worth of imported red wine (primarily benefiting France but secondarily aiding Spain) would be sufficiently compensated for by a Spanish offer to reduce from 13% to 10% the duty rate on \$900 million worth of imported industrial chemicals (which Sweden and Japan also export to Spain). In other words, is the potential benefit to the American economy from increased chemical exports sufficient to offset the potential disadvantage to U.S. winemakers from increased foreign competition?

9. See, e.g., Marks & Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 LAW & POL'Y INT'L BUS. 327, 328 (1975). In addition to a general tariff reduction averaging 35%, the Kennedy Round produced two agreements on nontariff subjects: an antidumping code and an agreement on the American Selling Price method of customs valuation. Under the American Selling Price system, imported products such as benzenoid chemicals and rubber footwear are valued at the level of their domestically produced competition for purposes of U.S. import duties. The United States failed to implement the American Selling Price Agreement and did not change its legislation or practices in response to the antidumping code. See R. BALDWIN, *NONTARIFF DISTORTIONS OF INTERNATIONAL TRADE* 134-36 (1970). The consistency of U.S. antidumping practices with the antidumping code remains a controversial subject. See Long, *United States Law and the International Anti-dumping Code*, 3 INT'L LAW. 464 (1969).

10. See, e.g., Buy American Act, 41 U.S.C. §§ 10a-10c (1976). See also notes 47-49 *infra* and accompanying text.

11. See notes 50-53 *infra* and accompanying text.

12. See notes 54-58 *infra* and accompanying text.

13. See generally Roschke, *The GATT: Problems and Prospects*, 12 J. INT'L L. & ECON. 85 (1977); Hudec, *GATT or GABB: The Future Design of the General Agreement on Tariffs and Trade*, 80 YALE L.J. 1299 (1971).

14. The EEC was created by the Treaty of Rome, done Mar. 25, 1957, 298 U.N.T.S. 11.

trading interests.¹⁵ Some of these conflicted with basic tenets of the GATT system, such as the most favored nation principle—all trading nations should be treated equally regardless of their relative economic strengths.¹⁶ Coupled with the fear that the GATT might be abandoned as were fixed exchange rates in 1971,¹⁷ these factors led foreign ministers from nearly one hundred nations, meeting in Tokyo in September 1973, to initiate negotiations to “cover tariffs, non-tariff barriers and other measures which impede or distort international trade in both industrial and agricultural products”¹⁸

This “Tokyo Declaration” gave the Tokyo Round its name and established its terms of reference. It also called for “improvements in the international framework for the conduct of world trade”¹⁹ and, in a marked departure from past GATT practice, recognized the need to adopt “differential measures” in order to give developing countries “special and more favourable treatment . . . in areas of the negotiation where this is feasible and appropriate.”²⁰ The Tokyo Declaration also made indirect reference to the need, based on past experience, for assurances that the United States would implement its international commitments.²¹ Although congressional delegation to the Executive of authority to negotiate and implement tariff reductions has historically assured U.S. implementation of tariff agreements, implementation of nontariff trade agreements has been considered more problematic, since they may require significant amendments of federal and perhaps even state laws.

The Trade Act of 1974²² establishes the legislative framework for U.S. participation in the Tokyo Round.²³ In the Act, Congress tried to establish negotiating credibility while simultaneously preserving its legislative power over foreign commerce by creating special “fast-track” procedures for approving and implementing nontariff agreements.²⁴ The President is to conclude agreements regarding nontariff barriers and other distortions of

15. For a full report on the 1964 UNCTAD Conference, see United Nations Conference on Trade and Development Proc., 1st Sess., U.N. Doc. E/CONF.46/139 (1964).

16. The most favored nation principle is embodied in article I of the GATT, 4 BISD at 2. See note 92 *infra* and accompanying text. See generally K. DAM, THE GATT 18-19 (1970).

17. See A. LOWENFELD, THE INTERNATIONAL MONETARY SYSTEM 128-31 (1977).

18. Declaration of Ministers Approved at Tokyo on 14 September 1973, para. 5, *reprinted in* BISD (20th Supp.) 19, 21 (1974) [hereinafter cited as Declaration of Ministers].

19. *Id.* para. 9, BISD (20th Supp.) at 22.

20. *Id.* para. 5, BISD (20th Supp.) at 21.

21. *Id.* para. 1, BISD (20th Supp.) at 20. See note 6 *supra*.

22. Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified in scattered sections of 5, 19 U.S.C.).
23. Section 101 of the Act authorizes the President to proclaim tariff reductions of up to 60% for U.S. duty rates that exceed 5% and of up to 100% for duty rates of 5% or less. 19 U.S.C. § 2111 (1976). For a comprehensive, section by section analysis of the Act, see Campbell, *The Foreign Trade Aspects of the Trade Act of 1974 (Part I)*, 33 WASH. & LEE L. REV. 325 (1976); Campbell, *The Foreign Trade Aspects of the Trade Act of 1974 (Part II)*, 33 WASH. & LEE L. REV. 639 (1976).

24. 19 U.S.C. § 2112 (1976).

international trade, consulting Congress regularly as the negotiations proceed.²⁵ He must then submit the completed agreements and any implementing legislation to Congress, where they will be considered under expedited bills procedures both in committee and on the floor of each house.²⁶ Although this procedure is designed to assure U.S. trading partners, to the greatest extent possible, that Congress will implement the agreements negotiated by the Executive, some MTN participants still doubt U.S. willingness to implement faithfully all nontariff agreements. Several nations have indicated that they will not carry out their commitments or regard the Tokyo Round as complete until Congress has accepted the agreements and enacted satisfactory implementing legislation.

The Trade Act specified other U.S. negotiating objectives,²⁷ including the longstanding but difficult goal of revising the GATT articles governing "border adjustments for internal taxes to redress the disadvantage to countries relying primarily on direct rather than indirect taxes"²⁸ GATT rules currently permit "indirect" taxes, such as sales, excise, and value-added taxes, to be excused or rebated for products that are exported. But the rules deny such favorable treatment to "direct" taxes, such as income taxes.²⁹ Congress believed that this double standard conferred an unfair

25. *Id.* § 2112(a).

26. Under the expedited bills procedures, the implementing bills are to be discharged automatically from committee 45 legislative days after their submission, if they have not been reported earlier, and are to be voted on by the full House of Representatives and Senate, without amendment, 15 legislative days after they are reported or discharged from committee. The Senate has an additional 30 working days in which to consider revenue bills, such as those amending U.S. tax or tariff procedures. These procedures are intended to ensure that nontariff agreements and their implementing legislation will be acceptable to the Congress before they are submitted, and that once they are submitted, Congress will accept or reject them promptly. *Id.* § 2191.

27. These additional negotiating aims include: (1) revision of the international rules governing use of "safeguards" to restrict imports and thereby permit domestic industries to adjust to growing competition from foreign industries, *id.* § 2117; see notes 78-91 *infra* and accompanying text; (2) negotiation of the MTN agreements on a sector by sector basis, *id.* § 2113(b); see notes 107-28 *infra* and accompanying text; (3) conclusion of mutually beneficial agreements with developing countries, *id.* § 2116; see notes 131-32 *infra* and accompanying text; and (4) negotiation of agreements assuring the United States access to vital supplies, *id.* § 2118. One special section of the Trade Act dealt with revision of the GATT framework of international trading rules and established several goals, such as introduction of trade-weighted voting, adoption of international fair labor standards, and introduction of provisions on access to vital supplies. *Id.* § 2131 (1976). To ensure that negotiators heard a broad segment of U.S. viewpoints, the Act also established a large network of private sector advisory committees representing industry, labor, commerce, and the general public, *id.* § 2155, and provided that designated members of the House Ways and Means Committee and Senate Finance Committee were to be formally accredited to the U.S. negotiating delegation, *id.* § 2211.

28. *Id.* § 2131(a)(5).

29. The purpose of allowing remission of indirect taxes imposed by the exporting country is to avoid double taxation, since it is presumed that indirect taxes are shifted forward to the consumer, and that similar taxes are imposed by the importing country. Direct taxes do not receive the same treatment because of the assumption that these taxes are shifted backward to the producer, rather than being passed on to the consumer when the goods are exported.

trading advantage on countries that rely heavily upon indirect taxes.

The Tokyo Declaration of September 1973 had called for the MTN to conclude in 1975.³⁰ No attempt was made to begin negotiations, however, until Congress enacted the Trade Act at the beginning of 1975. Shortly thereafter, the Trade Negotiations Committee—the MTN parent body—established separate negotiating committees to consider tariffs, nontariff matters,³¹ safeguards, agricultural trade, tropical products (those from developing countries), and sector-by-sector negotiations. In addition, negotiations on government purchasing practices that had been underway in the Organisation for Economic Co-operation and Development (OECD) were formally incorporated into the MTN. Finally, the Committee began negotiations to reform the framework of the GATT international trading system. These framework negotiations covered new provisions for settlement of disputes, access to vital supplies, emergency trade restrictions, and special treatment for developing countries.

The negotiations failed to move forward significantly until after the change of U.S. administrations in January 1977. Prior to this, the negotiations had languished because of the international economic recession and the perception of other governments that the Ford Administration lacked the congressional support necessary to implement nontariff agreements and the popular support necessary to win reelection. These foreign perceptions prevented the United States from exercising strong leadership in the negotiations prior to 1977 and caused other countries to mark time awaiting the results of the U.S. election. The MTN only developed momentum when the new Administration's negotiators, headed by Ambassador Robert Strauss, gained a commitment from the EEC to a series of deadlines extending from August 1977 through July 1978.³² By December 15, 1977, negotiators were to work out a general mathematical formula, or hypothesis, for industrial tariff reductions,³³ initial texts of agreements on specific nontariff matters, and procedures for negotiating reductions of agricultural tariffs.³⁴ The participants were then to produce a comprehensive general

Since the goods are in effect not taxed at all by direct taxes, no double taxation results. Rosendahl, *Border Tax Adjustment: Problems and Proposals*, 2 LAW & POL'Y INT'L BUS. 85, 90 (1970); Marks & Malmgren, *supra* note 9, at 351-55.

30. Declaration of Ministers, *supra* note 18, at para. 11, BISD (20th Supp.) at 22.

31. Subgroups were to consider quantitative restrictions on import quotas, customs matters, and product standards.

32. Other important MTN participants tacitly accepted this commitment made by the EEC nations.

33. Tariff negotiators first agree upon a hypothesis or mathematical formula by which all tariffs are, at least hypothetically, to be reduced. They then bargain over possible exceptions to or modifications of the formula with respect to specific products. See J. JACKSON, *supra* note 6, at 223-29. For an analysis of the specific alternative formulas considered at the Tokyo Round, see W. CLINE, N. KAWANABE, T. KRONSTJO & T. WILLIAMS, *TRADE NEGOTIATIONS IN THE TOKYO ROUND 67-75* (1978).

34. Negotiators agreed during the summer of 1977 that agricultural products would not be

agreement by mid-January 1978 and conclude the bargaining by July 15, 1978.

Although the first of these goals was substantially met, the other two proved harder to attain. January produced consensus among only a few developed nations and at a very general level. As 1978 went on, the July 15 date assumed a pivotal importance, at least among U.S. officials. But the goal for that date changed in subtle but significant ways: July 15 became less a target date for final completion of the MTN and more a deadline for political level agreement on all major elements of the negotiations, to be followed by a period for completing details.

That the MTN did not conclude by July 15 was largely due to the sheer complexity of the subjects under negotiation and the intractability of certain issues.³⁵ In the end, delegations from major developed countries drafted a Status Report on the current status of the negotiations for submission to the heads of state who were to confer at the Bonn economic summit meeting. In addition to discussing areas of progress, the Report notes some of the Tokyo Round's unresolved issues and skirts others. Although the developing countries have not accepted it, the Report serves as a useful focal point for analyzing the present status of the MTN.

II

PRESENT STATUS OF THE TOKYO ROUND: SPECIFIC ISSUES

The July 13 Status Report was in fact a definition of the scope and unresolved issues of the MTN rather than a draft final agreement. When the negotiators returned to the bargaining tables in September, their task was complicated by the tangled relationships among the subjects of discussion and the delicate balance of the negotiating package as a whole. For example, agricultural issues permeated many negotiating areas, including tariffs, subsidies, countervailing duties, and product standards. Participants were also considering all aspects of trade in steel—tariffs, government purchasing practices, subsidies—together as well as in subgroups that deal with each of these aspects. Discussion of the proposal to eliminate the U.S. nontariff barrier known as the American Selling Price system of customs valuation affects both the customs and the tariff negotiations, because abandonment of the system would involve changes in duty rates for the products

included among those subject to the general tariff formula, but would instead be negotiated when participating governments extended specific requests for tariff reductions to which other governments would respond.

35. These issues included market access for agricultural products, domestic subsidies that distort trade competition, use of selective temporary safeguard actions to limit imports from one nation only, and special treatment for developing countries.

to which it currently applies. Further, the issue of special treatment for developing countries arises in virtually all areas of the negotiations.

This mutual dependence of MTN subjects not only renders them difficult to comprehend and manage but also underscores the fact that the final MTN agreement must be carefully structured so that, as a whole, it accommodates the domestic political interests of the participating nations. The MTN results must, after all, be politically acceptable in the home countries or else the negotiations will have been little more than an academic exercise for the participants. The following discussion will attempt to explain the status of the issues before the negotiators and describe their interrelationships and influences on the effort to achieve the elusive multilateral political balance.

A. INDUSTRIAL TARIFFS

The success of prior multilateral negotiating rounds has substantially lessened the importance of periodic negotiated reductions in tariff rates. The average incidence of industrial tariffs is already relatively low in most industrialized countries.³⁶ In addition, the effect of negotiated tariff reductions on domestic industries is diminished by the fact that they are phased in over a period of years.³⁷ Thus, in actual practice, a tariff reduction of 40% applied to a 10% duty rate would achieve a net reduction of 4 percentage points over two to four years to a 6% duty rate—hardly a dramatic action. Nevertheless, many observers will utilize the average reduction of industrial tariffs that emerges from the MTN as a means to measure the Tokyo Round's success, because tariff reductions are a traditional focus of trade negotiations and because such reductions are readily identifiable and quantifiable.

The most effective way to negotiate tariff rate reductions for thousands of individual products from many countries is for the participants to adopt a general hypothesis or formula, specifying the percentage by which all tariffs are to be reduced, and then to bargain about particular products that are to be exempted from the general reduction or subjected to higher or lower duty reductions than those called for by the formula. In November 1977, the principal MTN participants agreed to adopt the "Swiss formula," a compromise that set an average overall tariff reduction of thirty-five to forty percent. This formula also attempted to reduce higher tariffs by a greater amount than lower ones, in order to accomplish "tariff harmonization."

At the same time, the major participants also agreed that the politically

36. W. CLINE, N. KAWANABE, T. KRONSJÖ & T. WILLIAMS, *supra* note 33, at 10.

37. The Trade Act requires that duty rate reductions made pursuant to trade agreements be phased in at not more than three percentage points per year, or one-tenth of the total reduction called for by the agreement, whichever is larger. All such "staging" must be completed within 10 years following the initial reduction. 19 U.S.C. § 2119 (1976).

sensitive subject of agricultural tariff reductions would not be negotiated by applying the general formula. Rather, each interested country would advance specific requests for duty reductions, and the countries to which the requests were directed would respond by making specific offers. This crucial compromise made possible the agreement on a tariff formula and enabled the MTN to move forward. In addition, the negotiating parties determined that the agreed-upon tariff reductions would be phased in over eight years and that a review after five years would determine whether external economic conditions warranted continuance of the reductions. Although this "conditionality" factor was vital to acceptance of the formula by the EEC nations, its real importance is probably limited in view of the relatively minor tariff reductions involved.

In January 1978, the United States and several other countries presented comprehensive tariff offers specifying the products they were willing to subject to the tariff formula and other tariff changes they were prepared to make.³⁸ Bargaining then began over possible amendments as negotiators sought to gain additional access to other nations' markets in return for opening their own domestic markets to foreign exporters. The principal U.S. goals during this bargaining were: to gain improvement in the offers of several trading partners, most notably Japan and the EEC; to minimize reductions in the initial offers made by the United States and other nations, which could quickly erode the amount of the general tariff reduction; and to achieve substantial reductions in foreign tariffs on goods exported by U.S. industries.³⁹ Improvement of foreign nations' tariff reduction offers, the first goal, was hampered by differing interpretations of the value of the offers.⁴⁰ Correlatively, domestic political pressures strained the ability of the United States to maintain its original offers to exempt some products, especially textiles,⁴¹ from any tariff reductions.⁴²

38. Participants who made offers on January 23, 1978 included the United States, the EEC, Canada, Japan, the Nordic nations (Norway, Sweden, Finland, and Iceland) jointly, and Switzerland. Australia subsequently advanced offers. South Africa, New Zealand, and several developing countries subsequently indicated that, although they would not make comprehensive offers, they would be willing to negotiate on an item-by-item basis. See U.S. Delegation to the Multilateral Trade Negotiations, Background Notes: Tariffs (July 10, 1978) (public document prepared for the press) (on file at the *Cornell International Law Journal*).

39. Affected U.S. exports include paper, computers, office machines, scientific instruments, and chemicals.

40. For example, on items in which it had no export interest, should the EEC give credit to the United States for "greater than formula" offers—offers to reduce tariffs on particular products by more than the 40% reduction achieved by application of the Swiss formula?

41. At this writing, a rider to the Export-Import Bank Appropriation Bill that would require the exclusion of textiles from tariff reductions is under consideration in a House-Senate conference committee, having been adopted by the Senate.

42. The Trade Act requires that articles subject to outstanding escape clause import relief actions or national security actions be withheld from trade negotiations. 19 U.S.C. § 2137 (1976). At present, this affects principally petroleum products (national security), specialty steel, televisions, shoes, and citizens band radios (escape clause).

The third U.S. objective, achievement of substantial tariff reductions in product sectors of particular interest to U.S. exporters, was still the subject of extensive negotiation at the end of the summer.

The July 13 Status Report announced that the goal of the MTN was to achieve substantial liberalization compared with the Kennedy Round. This statement suggests that a general tariff reduction will be considered a success if it falls within the same range as, but does not necessarily equal or exceed, the thirty-five percent decrease achieved by the Kennedy Round. The Status Report also appears to acknowledge that precise reciprocity is not possible and that countries which give up more than they receive in the tariff negotiations may have to seek offsetting concessions in another part of the MTN. The Report only thinly veils the inability of the United States to achieve all of its objectives in the sectoral negotiations. The Report adds that a high level of "binding of duties" by all participants is an important objective, referring to the fact that many nations apply duty rates that are not "bound" or guaranteed in the GATT, with the result that they can raise the rates at will without incurring any penalty under the GATT.

The Status Report assures developing countries that the final MTN tariff offers will contain measures of special and differential treatment for developing countries, but adds that developed countries expect adequate contributions from developing countries commensurate with their state of development. This special treatment almost certainly will not involve application of lower duty rates to products of developing countries than to products from developed countries, since this would be contrary to the most favored nation principle underlying the international trading system.⁴³ Rather, nations will probably be able either to apply reductions greater than those set by the formula to products of particular export interest for developing countries or to phase in tariff cuts on such products more rapidly than other reductions.⁴⁴

43. The Generalized System of Preferences is an existing international program under which developed countries grant more favorable tariff treatment to selected products imported from developing countries than to the same products when imported from other developed countries. Although the GATT Contracting Parties adopted a temporary 10 year waiver to give the Generalized System of Preferences international recognition, the system has not yet been adopted as a permanent part of the international trading system. See generally Graham, *The U.S. Generalized System of Preferences for Developing Countries: International Innovation and the Art of the Possible*, 72 AM. J. INT'L L. 513 (1978); Nemmers & Rowland, *The U.S. Generalized System of Preferences: Too Much System, Too Little Preference*, 9 LAW & POL'Y INT'L BUS. 855 (1977).

44. These possibilities were discussed during the early years of the MTN in the negotiating group on "tropical products"—products of less developed countries. That group has now virtually disbanded and its efforts have been incorporated into the larger tariff negotiations. Developed countries disagreed over what constituted appropriate contributions to the tropical products negotiations. A number of the developed countries made minor improvements to their generalized systems of preference as their entire contribution. Only the United States insisted on some measure of reciprocal concessions from the developing countries on the ground that they had to be prepared to accept progressively greater responsibilities in the inter-

B. NONTARIFF MATTERS

Congress must, of course, approve the results of the nontariff negotiations⁴⁵ and in most cases implement them by legislation.⁴⁶ In addition to its effect upon practices of the federal government, this legislation may affect some actions of state and local governments, such as the purchasing of goods for government use or the legislation of product standards.

1. Government Procurement

Government agencies buy for their own use everything from spacecraft to paper clips. Nations reserve most of these markets for domestic producers through various techniques, including the establishment of formal "margins of preference" such as the federal Buy American Act,⁴⁷ exclusion of foreign bidders from eligibility lists, failure to advertise contracts or solicit bids, and the award of contracts without disclosing the criteria on which the award is based. Because they limit the access of foreign manufacturers to domestic markets, these practices constitute significant nontariff barriers to international trade. The present GATT rules do not expressly cover government procurement practices except by exempting preferences for domestic manufacturers from the "national treatment" principle. That principle requires nondiscrimination in the conditions of sale applied to domestic and foreign products.⁴⁸

An international agreement cannot seriously be expected to eliminate all preferences for domestic goods from government purchasing policies. An agreement could, however, explicitly require fairness and openness in the use of domestic preferences. Express margins of preference would be tolerable if applied in accordance with reasonable procedures. Under such a system, the formal margin of preference would protect domestic manufacturers to a limited extent, just like a tariff, yet also permit foreign suppliers

national trading system in return for any special treatment that they were to receive. Following this approach, the United States concluded minor trade agreements with Mexico on December 2, 1977 and with India on July 26, 1978, which called for a reciprocal exchange of concessions. These agreements have not yet been implemented.

45. The presentation of subjects in this article follows the author's concept of a logical organization, rather than the more generally accepted one, which would, for example, categorize the negotiations on subsidies and countervailing duties under "nontariff measures" rather than under "reform of the trading system" as is done here, *see* notes 65-77 *infra* and accompanying text.

46. *See* notes 23-26 *supra* and accompanying text.

47. 41 U.S.C. §§ 10a-10c (1976). Such margins of preference may be fixed in terms of percentage amounts. For example, the regulations that implement the federal Buy American Act establish a six percent margin of preference: foreign goods may be used when their cost is less than 94% of the cost of comparable domestic goods. 41 C.F.R. § 1-18.603-1 (1977).

48. Article III of the GATT embodies the national treatment principle and article III(8)(b) exempts government purchasing, 4 BISD at 7.

to compete in the same market despite the preference for goods manufactured domestically.

Negotiations aimed at drafting an international government procurement code began several years ago in the Organisation for Economic Co-operation and Development (OECD). The draft agreement produced by these negotiations as well as the issues still under discussion were transferred to the MTN in 1976. A major unresolved issue in these negotiations concerns which government agencies and activities would be covered by any final agreement. Defense contracts that involve national security will not be covered, but the treatment of quasi-governmental bodies such as transportation and communication facilities and publicly owned utilities remains unsettled. Of course, national viewpoints tend to reflect the degree of government ownership of such entities in MTN participant countries. Although the Status Report's general language indicates significant disagreement, the Report's sponsors agreed that "developing country adherents will not offer full coverage at this time, but . . . their coverage will be expanded as their economic development needs allow."⁴⁹

2. *Technical Barriers to Trade: Standards*

A U.S. antipollution standard could be written in technical terms that would effectively exclude Japanese automobiles from the U.S. market. The EEC could require American-made radios to be certified by an EEC authority as conforming to EEC electrical safety standards and then refuse to certify the U.S. products. Japan could reject the results of foreign safety tests of gas stoves and subject U.S. stoves to more stringent or expensive tests than those applied to comparable Japanese products. Canada could require labeling of California wine as "Ersatz Burgundy from California," ostensibly to prevent deception of consumers. These imaginary examples illustrate how nations may use product standards, testing, and certification as nontariff trade barriers. In reality, it is much more difficult to distinguish between illegitimate exclusion of imports and legitimate regulation protecting health, safety, the consumer, or the environment. The GATT does not assist this effort, since it does not deal with the effect of standards practices upon international sales of goods.

A GATT working party developed a draft code of conduct for preventing technical barriers to trade (standards code) in 1973, prior to the commencement of the MTN.⁵⁰ This draft has formed the basis of the MTN standards negotiations, which have moved slowly because of several inherent difficulties. First, it is hard to separate overly restrictive applications of product standards from cases in which they are applied fairly to accomplish

49. See Status Report, *supra* note 2, at 2.

50. See Groetzinger, *The New GATT Code and the International Harmonization of Products Standards*, 8 CORNELL INT'L L.J. 168, 183-88 (1975).

their proper purpose. Second, the appearance of ceding some degree of national sovereignty over issues as politically sensitive as health or safety regulations creates popular suspicion of international standards agreements. Third, the draft code would apply to unduly restrictive applications of product standards by state and municipal governments as well as by private organizations, thereby creating political and perhaps constitutional problems for national governments in federal systems.⁵¹ Finally, because the EEC is still in the process of harmonizing its internal standards practices, Europeans are concerned about how the draft code would affect existing EEC practice.

Negotiators have addressed these politically charged problems by developing a wholly procedural agreement. Rather than dictate substantive standards, the draft code would disapprove the use of standards, testing, and certification to obstruct international trade. In addition, it advocates use of notice and comment procedures for adopting proposed regulations, promotion of international standardization, and use of foreign testing and certification whenever feasible. The code also calls for the provision of technical assistance to developing countries to help them establish standards and suggests procedures for dealing with complaints of code violations.

Two major issues remain unsettled. The first concerns the nature of the obligations undertaken by federal governments with respect to state and local governments and private entities. The draft code proposes that central governments use all reasonable means within their power to ensure that nonfederal entities comply with the code's requirements. To establish a violation of the code by a nonfederal entity, the complaining government would thus have to show not only noncompliance with the code's requirements but also that the central government had failed to use all reasonable means to secure compliance. By including the latter requirement, the code's drafters intended to establish international discipline over nonfederal entities while reconciling the legal and political needs of signatories with federal forms of government.⁵² Renegotiation of this issue began in early 1978, however, when several MTN participants with highly centralized governments suggested that this "best efforts" obligation was not strong enough.

The second major remaining issue involves regional certification sys-

51. The prevailing interpretation within the Executive branch is that the commerce clause, U.S. CONST. art. I, § 8, cl. 3, empowers the Congress to regulate all activities of state and local governments as well as of private entities that affect foreign commerce. Congress may do so by enacting legislation that implements a trade agreement. Accordingly, the main issues in the United States with respect to implementing agreements calling for federal regulation of such activities are not constitutional ones, but the political questions of how much additional federal regulation is acceptable and what forms it may take.

52. Potential signatories, other than the United States, that have federal forms of government include Canada, Australia, and Switzerland.

tems such as EEC-wide systems for certifying that products conform to EEC standards. Again, the draft code requires participants to use all reasonable means within their power to ensure that the systems are open to suppliers from nonmember countries. Several participating governments have questioned the adequacy of this requirement. The July 13 Status Report links this issue to the first, stating that the negotiators "agree to seek a balanced level of commitment and advantages for all adherents to the code in regard to the development of product standards and in regard to related certification requirements."⁵³

3. Customs Valuation

Most import duty rates are imposed on an *ad valorem* basis⁵⁴—as a percentage of the appraised value of the goods as determined by a customs official at the point of entry. The method and accuracy of this appraisal can be as important as the tariff rate itself in determining the actual amount of the duty that is payable.

There are two basic problems with customs valuation methods currently used in international trade. The first is that there is little uniformity among the methods used by different importing nations. As a result, the same nominal tariff rate may have differing effects in different countries, depending on the valuation method used and often on the arbitrary or subjective judgment of a customs official. The second problem arises because several nations employ valuation methods that "uplift" or artificially inflate the value of certain imported products. This inflation significantly increases the amount of duty that is payable on an *ad valorem* basis.

The current GATT rules do not directly address the problem of arbitrary and nonuniform valuation methods, and are ineffectual in dealing with methods that artificially inflate values. Article VII of the GATT provides that customs values "should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values."⁵⁵ But the GATT does not require that any particular method of valuation be used and thus leaves Contracting Parties free to establish differing valuation systems.

The main purpose of the MTN negotiations on customs valuation is to develop a new set of international rules that will harmonize divergent national valuation systems and reduce the possibility of artificially inflated customs appraisals. Another purpose is to allow traders to predict with

53. Status Report, *supra* note 2, at 3.

54. Duty rates that are not specified as *ad valorem* may be specific, such as 10 cents per pound, or compound, such as six percent plus three cents per pound.

55. GATT art. VII(2), 4 BISD at 12.

more accuracy and certainty the value of their products for customs purposes by introducing more objective valuation criteria.

The current U.S. system for customs valuation is an example of both the unpredictability and the artificially "uplifting" characteristics that many systems contain. Under the American system, there are nine different methods for determining customs value, depending on the product being valued and the circumstances under which the product is imported. One of these nine valuation methods is the controversial American Selling Price system, by which certain products are valued for tariff purposes at the level of the domestically produced articles with which they compete.⁵⁶ Application of this system can inflate the payable duty by as much as one hundred percent.⁵⁷ This American Selling Price system was first enacted in 1922 and thus is protected by "grandfathering" against the GATT admonition that customs appraisals should not reflect "the value of merchandise of national origin . . . or fictitious values."⁵⁸ The valuation systems of most other nations also have controversial and protective features that create problems for U.S. exporters.

The current draft customs code⁵⁹ that is under consideration in the Tokyo Round establishes the "transaction value"—defined as the price actually paid or payable with additions for certain costs possibly not reflected in that price—as the most preferred valuation method. But transaction value cannot be used in many cases, such as those involving non-arms-length transactions between a subsidiary and a parent company. Accordingly, the draft code establishes alternative bases of valuation, to be used in order of precedence when the transaction value is inappropriate: the transaction value for an "identical good" preferably made by the same producer but sold in a different transaction; the value of "similar goods" that are produced in the same country and that are commercially interchangeable; a

56. 19 U.S.C. § 1401a(e) (1976). The products subject to the American Selling Price system include benzenoid chemicals, rubber footwear, and certain types of shellfish. See K. DAM, *supra* note 16, at 189-92. For a detailed description of the system, see *Tariff and Trade Proposals: Hearings Before the House Comm. on Ways and Means*, 91st Cong., 2d Sess. 645 (1970) (statement of Ambassador Carl J. Gilbert, Special Representative for Trade Negotiations).

57. See note 54 *supra*.

58. GATT art. VII(2), 4 BISD at 12. Problems of customs valuation have persisted despite the activities of the Customs Cooperation Council (CCC), an international organization located in Brussels and composed of 81 member countries, and despite the conclusion of a Convention on the Valuation of Goods for Customs Purposes (the Brussels Definition of Value), which was drafted under CCC auspices. The Convention defines the customs value of goods as "the price . . . they would fetch . . . in the open market." The latitude provided by this definition has permitted the values and duties payable to be inflated in many instances. See P. Giguere, *Development of New International Classification and Valuation Systems: Progress in Brussels*, reprinted in PROCEEDINGS OF THE FOURTH ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS 212-23 (1978).

59. For additional descriptive material on the draft customs valuation code, see Chamber of Commerce of the United States, Information Service Bulletin No. 9 (Fall 1978).

"deductive value" based on the price of the good on resale after importation minus expenses involved in the resale; and a "computed value" based on the estimated cost of production.

The July 13 Status Report notes that the draft customs code "represents a solid basis for instituting a harmonized international system for customs valuation which will provide a uniform and fair system of valuation in conformity with the provisions of the GATT."⁶⁰ Adoption of such a code by the United States would lead to the elimination of the American Selling Price method of valuation, a result that has been sought by U.S. trading partners for several years. The Kennedy Round produced an agreement that would have led to elimination of the American Selling Price system; but as noted above,⁶¹ the United States did not implement this agreement. Adoption and implementation of a customs agreement by the United States would constitute a significant contribution to the MTN, for which the United States would expect adequate reciprocal concessions on customs matters or in some other area of the negotiations. This expectation, plus the fact that American abandonment of the American Selling Price system would coincide with the adoption of new tariff rates granting protection similar to that now provided by the American Selling Price method, exemplifies how closely MTN subjects are intertwined.

4. *Import Licensing*

Products moving in international trade frequently are subject to needless bureaucratic delays and red tape as a result of cumbersome import licensing systems. The MTN includes an effort to limit such unnecessary administrative impediments to trade by developing international rules limiting the circumstances in which governments may require import licenses. The Status Report speaks of this as an attempt to ensure that licensing systems are employed by all countries only when necessary, are not designed to distort trade, are transparent and are administered in a fair and equitable manner. Separate draft texts cover restrictive licensing, by which import quotas are administered, and automatic licensing, which is used for nonrestrictive purposes such as the collection of statistics. At present, restrictive licenses are often administered arbitrarily and without disclosure of the permitted quota amounts, and automatic licensing creates unnecessary burdens for importers.

5. *Commercial Counterfeiting*

International trade in counterfeit goods, ranging from imitation Levis to spurious Swiss watches, is a serious and growing problem. This practice

60. Status Report, *supra* note 2, at 2.

61. See note 9 *supra*.

costs genuine producers both money and good will and defrauds consumers who rely on false trademarks. Most countries participating in the MTN seek to end these deceptive practices by strengthening existing international rules. Embodied in article IX of the GATT⁶² and article 9 of the Paris Convention on Protection of Industrial Property,⁶³ the existing rules provide generally that the member countries should cooperate with each other in preventing the use of trade names in ways that misrepresent the true origin of a product. The MTN is considering various means of tightening these rules, such as supplementing the Paris Convention to require forfeiture, in addition to seizure, of counterfeit goods that are presented for importation. The Customs Procedural Reform and Simplification Act of 1978⁶⁴ now requires forfeiture of counterfeit merchandise when imported into the United States. Negotiations in the MTN are aimed at extending this U.S. requirement to an international agreement.

6. *Rules of Origin*

Most industrial products are manufactured from several components. These components and their constituent materials often originate in different countries. The application of an international trade measure to the exported products of a particular country or group of countries implies the use of some rule of origin to identify which products contain enough materials, components, or value-added from a particular country to be considered products of that country.

The failure of the GATT to address this subject leaves the Contracting Parties technically free to apply any rule of origin they choose. This can lead to significant restrictions of international trade. For example, the agreements on trade between the EEC and the European Free Trade Area (EFTA)⁶⁵ require in many cases that as much as ninety-five percent of a product's value be of EEC or EFTA origin for the product to move freely between the two trading blocs. This encourages manufacturers to purchase components from within the trading bloc rather than from potentially more efficient outside suppliers, creating a nontariff barrier to trade. This barrier has had a particularly restrictive effect upon U.S. textile exports, because the EEC and EFTA have refused to recognize clothing and other articles made in Europe from U.S. cloth as "products of" EEC or EFTA bloc coun-

62. GATT art. IX, 4 BISD at 15.

63. *done* July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923; 24 U.S.T. 2140, T.I.A.S. No. 7727.

64. Pub. L. No. 95-410, 92 Stat. 888 (1978).

65. Seven nations—Austria, Denmark, Finland, Norway, Portugal, Sweden, Switzerland, and the United Kingdom—formed the European Free Trade Association largely in response to the organization of the EEC by the "original six" (Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany). *See generally* EUROPEAN FREE TRADE ASSOCIATION, BUILDING EFTA (1966).

tries. The result is that, because such products cannot be traded freely between the EEC and EFTA blocs (and in fact are subject to very high duty rates), European producers do not buy their raw textile materials from the United States. U.S. negotiators have protested these restrictive rules of origin for several years, and these efforts may prove successful in the MTN.

III REFORM OF THE TRADING SYSTEM

A. SUBSIDIES AND COUNTERVAILING DUTIES

Because the GATT is a system designed primarily to promote competition among private industries, the Contracting Parties have had difficulty using GATT rules to regulate government subsidies to private industry. This problem is not so acute with respect to those relatively few direct subsidies explicitly granted to promote exports, since the GATT rules and settled practice generally characterize these as unfair methods of competition. Problems arise instead with respect to the myriad forms of subsidies that are viewed by the governments granting them as legitimate instruments of domestic socioeconomic policy, but that may almost incidentally confer advantages upon recipient industries in the international marketplace: nationalizations, tax holidays to invest in economically depressed regions, concessionary loans or direct grants to maintain full employment during recessions, and grants for research and development of new technology. Such practices raise a central dilemma for the international trading system: how to balance the freedom to make these sovereign national policy choices against the collective rights of the international system.

1. *Current State of the Law*

The GATT rules on subsidies and countervailing duties seem straightforward. Article XVI prohibits export subsidies that produce a lower price for exported industrial products than is charged domestically.⁶⁶ Contracting Parties must notify GATT signatories of any subsidy that increases exports or decreases imports and must discuss these subsidies with other

66. GATT art. XVI(4), 4 BISD at 27, provides:

Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.

Contracting Parties upon request. Any "bounty or subsidy" that "cause(s) or threaten(s) material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry"⁶⁷ may be subject to the imposition by the importing nation of a countervailing duty sufficient to offset the effect of the subsidy. Unfortunately, these deceptively simple rules are fraught with legal and political problems. The GATT does not define export subsidy, which contributes to the difficulty of distinguishing an export subsidy from a domestic one. The illustrative list of prohibited export subsidies, developed in 1960, has helped guide resolution of complaints. But at the same time, it has limited the inquiry into whether a violation has been committed to the simplistic question of whether the challenged practice appears on the illustrative list.⁶⁸ Moreover, it is not clear whether the practices on the illustrative list are presumed to result in dual pricing—the second requirement for establishing a violation.⁶⁹ If no such presumption exists, the prohibition may be unworkable, since it will usually be extremely difficult to prove a pattern of dual pricing at the wholesale level.

U.S. countervailing duty law has created considerable international friction because, unlike the GATT,⁷⁰ it does not require a showing of material injury to a domestic industry before sanctions will be imposed. In-

67. GATT art. VI(6)(a), 4 BISD at 11.

68. The list may in fact be obsolete. For example, it does not directly cover the U.S. and EEC practices that a GATT panel recently found to constitute illegal export subsidies under the GATT rules. The case involved an EEC complaint against the U.S. Domestic International Sales Corporation (DISC) legislation and U.S. complaints against Belgium, France, and the Netherlands. The United States defended the DISC on the ground that it permits an indefinite deferral of income taxes on export income, but does not technically permit an exemption or remission of such taxes—two of the prohibitions contained in the GATT illustrative list of export subsidies. Similarly, the U.S. complaint against the Belgian, French, and Dutch practices was based on the fact that in those countries repatriated income from export subsidiaries located in tax haven countries abroad was not taxed or was taxed at a very low rate—a practice that is not explicitly covered by the illustrative list. The arguments before the panels and the opinions of the panels in this case strained to characterize the challenged practices as falling within one of the categories described in the illustrative list, rather than consider whether the practices themselves were unfair or were export subsidies that distorted international trade.

69. GATT art. XVI(4), 4 BISD at 27. See note 66 *supra*. The panel in the DISC and EEC cases, note 68 *supra*, applied a rebuttable presumption that practices described in the illustrative list result in dual pricing. This interpretation, however, is not required by the language of GATT article XVI or by the illustrative list.

70. See note 67 *supra*. GATT article VI(6)(a) is clearly inconsistent with U.S. countervailing duty law, 19 U.S.C. § 1303 (1976). But the United States in 1947 undertook to apply the GATT only to the extent that it is consistent with pre-existing U.S. legislation. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 61 Stat. A2051 (1947), T.I.A.S. No. 1700, 55 U.N.T.S. 308. The U.S. countervailing duty law, 19 U.S.C. § 1303 (1976) was first enacted in the 1890's. For an analysis of U.S. countervailing duty practice, see Marks & Malmgren, *supra* note 9, at 346-48; Feller, *Mutiny Against the Bounty: An*

stead, the Secretary of the Treasury must impose countervailing duties upon dutiable imports⁷¹ that he finds have benefited from a "bounty or grant." Understandably, other nations participating in the MTN wish to secure U.S. adoption of an injury standard, whereas the United States wants the GATT rules to impose greater discipline on foreign governments that indirectly confer competitive advantages upon their industries. These factors alone comprise the essential ingredients of a stalemate.

Further, many U.S. traders feel that the GATT subsidy rules handicap them by permitting governments to excuse or rebate indirect taxes on exported goods⁷² but not direct or income taxes.⁷³ Because the United States relies more heavily upon direct taxes than do many other nations, including those of the EEC, U.S. exports to those countries allegedly bear not only the full burden of U.S. income taxes, but also the indirect taxes assessed by the importing countries, such as the levies imposed by the EEC under its system of border tax adjustments.⁷⁴ EEC exports to the United States, by contrast, must bear only the proportionately smaller European income taxes in addition to any indirect taxes imposed by the United States. This discrepancy permits EEC goods, as well as those of other nations, to be sold at more favorable prices in the United States than American goods marketed abroad.

Congress has objected strenuously to this feature of the GATT and, in the Trade Act of 1974, directed the President to "take such action as may be necessary . . . [to secure] the revision of GATT articles with respect to the treatment of border adjustments for internal taxes to redress the disadvantage to countries relying primarily on direct rather than indirect taxes for revenue needs."⁷⁵ Some view such a revision as politically imperative for

Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law, 1 LAW & POL'Y INT'L BUS. 17, 19-38 (1969).

71. Countervailing duties may be imposed on duty free imports only after a showing of injury. 19 U.S.C. § 1303(b)(1)(A) (1976). Because duty free goods were not subject to countervailing duties until this provision was enacted as part of the Trade Act of 1974, *supra* note 22, it does not benefit from the "grandfather" clause protection of countervailing duty law generally. See note 58 *supra* and accompanying text. See Comment, *United States Countervailing Duty Law: Renewed, Revamped and Revisited—Trade Act of 1974*, 17 B.C. INDUS. & COM. L. REV. 832, 855-60 (1976).

72. GATT art. VI(4), 4 BISD at 11, provides:

No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

73. As noted above, note 68 *supra*, the exemption or remission of direct taxes is one of the practices set forth in the GATT illustrative list of prohibited export subsidies. See notes 28-29 *supra* and accompanying text.

74. For a more complete explanation of this complex system, see Feller, *supra* note 70.

75. 19 U.S.C. § 2131(a)(5) (1976). An American electronics manufacturer recently challenged a determination by the Treasury Department that a rebate of indirect taxes by the Government of Japan did not constitute a bounty or grant within the meaning of U.S. counter-

the United States; but the EEC nations and others consider it virtually non-negotiable.

Negotiations on subsidies and countervailing duties are further complicated by the fact that the 95th Congress adjourned without having extended the statutory authority of the Secretary of the Treasury to waive the imposition of countervailing duties in certain cases in which subsidies are found to exist. This waiver authority, which was enacted primarily to provide the flexibility to prevent countervailing duties from becoming an undue irritant to the negotiations, will expire on January 3, 1979. Unless some currently unforeseen solution is found, the expiration of this authority will cause countervailing duties to be imposed on seventeen articles for which the waiver had been used, including several articles from the EEC for which the offending subsidy was provided under the politically sensitive Common Agricultural Policy. At this writing, U.S. and EEC negotiators are locked in a "chicken and egg" stalemate over whether the subsidy negotiations must first be concluded in the MTN before the U.S. waiver authority could be extended, or whether the waiver authority must be extended before the MTN negotiations can conclude.

2. *Toward an Agreed Solution*

As the July 13 Status Report implies, negotiators have produced an outline agreement that attempts to balance the desire of EEC nations that the United States adopt an injury standard for countervailing duty determinations against U.S. demands for increased restraint of foreign government subsidies. The outline agreement builds upon the current subsidy and countervailing duty provisions in articles XVI and VI of the GATT. It provides the first definition of an export subsidy and updates the illustrative list of prohibited export subsidies.

The outline recognizes that politically sensitive domestic subsidies "are intended to promote important objectives of national policy but may have adverse effects, which signatories should seek to avoid, on the trade and production interests of other signatories."⁷⁶ The United States prefers that this qualified undertaking be backed by "indicative guidelines" specifying the types of domestic subsidies that produce adverse trade effects and the

vailing duty law. This case posed a potential threat to U.S. international trade relations because a holding for the plaintiff would have required the Treasury to assess penalty duties against the Japanese electronic products and, by extension of the principle, against many other products from other countries. To do so would squarely contradict article VI(4) of the GATT. But this threat faded when the United States Supreme Court held unanimously that the Secretary of the Treasury had acted within his statutory discretion in determining that the Japanese practice was not a bounty or grant under U.S. law. *Zenith Radio Corp. v. United States*, 98 S. Ct. 2441 (1978).

76. MTN Outline of An Arrangement with respect to Subsidies and Countervailing Duties (on file at the *Cornell International Law Journal*).

ways in which such effects can be avoided. Whether these guidelines will be made part of the agreement has not been settled.

The outline agreement establishes a "two-track" approach to offset the effects of subsidized imports. The first track would follow the traditional rule of applying countervailing duties to subsidized imports that cause or threaten material injury to a domestic industry. The United States would undertake to add an injury standard to federal countervailing duty law, in return for the exercise by other Contracting Parties of satisfactory additional discipline over foreign subsidy practices. In addition to this traditional response, the second track would permit the imposition of countermeasures against any subsidy practice that results in "serious prejudice" to another signatory country. The concept of serious prejudice, which has little meaning in GATT article XVI(1),⁷⁷ might include not only adverse effects upon domestic industries from the increase in subsidized goods imported, but also the loss of export markets. These export markets could be diminished either by alternative purchases of subsidized goods rather than imported products within the subsidizing country or by the competitive advantage the subsidized goods would have in third countries where they compete with imports from nations that do not subsidize their exports. Extension of countermeasures to these situations would significantly strengthen GATT discipline over subsidy practices.

Important issues concerning the use of countermeasures remain unresolved. In the American view, when a subsidy rule is violated, such as by use of an export subsidy enumerated on the illustrative list, serious prejudice to the affected country should be presumed and that nation should be permitted to impose countermeasures pending an international review. The EEC nations and other countries believe that the affected nation should only be able to take such countermeasures after an international review.

As the Status Report indicates, special subsidy rules for developing countries are still under consideration. One possible provision, which has not been generally accepted, would apply somewhat less stringent rules to the infant industries of developing countries, but would require such special treatment to be phased out as the industry becomes internationally competitive.

The outline agreement would also tighten the reporting requirements and the international mechanism for reviewing subsidy practices and coun-

77. GATT art. XVI(1), 4 BISD at 26, provides:

In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any . . . subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

tervailing duties. The agreement would establish a Committee of Signatories that would meet periodically to apply the reporting requirements and dispute settlement mechanism.

B. SAFEGUARDS

Every country needs a safety valve when import competition seriously injures a domestic industry and idles its workers. Article XIX of the GATT and related provisions in U.S. legislation⁷⁸ contain such escape clauses that permit temporary use of import barriers in such cases, ostensibly to allow the domestic industry an opportunity to adjust, provided certain conditions are met.⁷⁹ U.S. escape clause legislation and the GATT differ in some minor respects, but there have been no international challenges to U.S. safeguard actions. This probably is because the United States is one of the few nations that even pretends to observe the rules of article XIX.

Article XIX requires that a country planning to invoke the escape clause notify the GATT Secretariat in advance if possible⁸⁰ and consult with affected Contracting Parties upon request.⁸¹ If these consultations do not produce agreement, the Contracting Party invoking the escape clause may raise trade barriers for the product concerned. Affected countries may withdraw "substantially equivalent concessions" by erecting trade barriers of their own.⁸² But these provisions plus the growing ineffectiveness of the GATT dispute settlement mechanisms⁸³ have combined to create a disincentive for Contracting Parties to take import relief measures within the discipline of the GATT escape clause provisions. This is because in the absence of a settlement, these provisions permit affected countries to retaliate quickly and directly against an escape clause action. By contrast, the slow pace of international dispute settlement procedures under GATT article XXIII affords a reasonable assurance that by simply erecting a trade barrier unilaterally a Contracting Party is less likely to suffer GATT-sanctioned trade retaliation than if it follows the escape clause procedures prescribed in article XIX. Many countries therefore do not use article XIX procedures when restricting trade. The United States, Australia, and Ca-

78. See 19 U.S.C. §§ 2251-2253 (1976).

79. These conditions are that: "as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under [the] GATT . . . [a] product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury" GATT art. XIX(1)(a), 4 BISD at 36.

80. Article XIX(2) of the GATT provides that advance notice can be dispensed with "[i]n critical circumstances, where delay would cause damage which it would be difficult to repair" 4 BISD at 37.

81. *Id.*

82. This provision is set forth in GATT art. XIX(1)(b), 4 BISD at 36.

83. For an analysis of this problem, see J. JACKSON, *supra* note 6, at 81, 750, 757; Roschke, *supra* note 13, at 89.

nada have been the only countries to use article XIX as a general practice in recent years.

The history of article XIX clearly establishes that escape clause actions are to be taken on a most favored nation basis: a country must apply temporary import restrictions equally to imports from all sources. U.S. legislation, however, permits the President to impose U.S. escape clause import relief other than on a most favored nation basis, "but only after consideration of the relation of such actions to the international obligations of the United States."⁸⁴ This transfers from Congress to the President the onus of imposing import restrictions against a particular country.

The problem with the GATT's requirement that escape clause actions be based on the most favored nation principle is that in recent years countries have chosen for political reasons to restrict imports on a selective basis, that is, against products of one or two countries only. Several reasons may be advanced for this: an import surge may be attributable to the export policies of only one or two nations;⁸⁵ the importing nation may fear the consequences of limiting imports from a major trading partner; or the importing country may find it easier to obtain authority to restrict the imports of only one or two countries than to limit all imports. Countries that have taken these selective actions have circumvented GATT discipline by imposing orderly marketing agreements upon selected trading partners or by surreptitiously securing "voluntary" export restraint commitments from certain exporting countries.⁸⁶ More recently, GATT Contracting Parties have shown a willingness to impose selective actions upon countries that have not agreed to them. For example, the United Kingdom recently imposed a selective action against imports of televisions from the Republic of Korea. Orderly marketing agreements avoid the usual GATT requirements of reporting, consulting, settling amicably, or suffering retaliation because the Contracting Party against whom such agreements are imposed

84. 19 U.S.C. § 2253(k) (1976).

85. The United States took selective actions in June 1977 against footwear imports from Taiwan and Korea and against television imports from Japan by negotiating "orderly marketing agreements" with those countries. Under the agreements, Taiwan, Korea, and Japan agreed to restrain their exports and the United States agreed to limit its imports of footwear and televisions at specified levels. See 42 Fed. Reg. 18,269, 32,440 (1977) (agreement regarding footwear and Presidential proclamation implementing it); 42 Fed. Reg. 26,195, 32,747 (1977) (agreement regarding televisions and Presidential proclamation implementing it).

86. In general trade usage, a "voluntary restraint agreement" or "voluntary export restraint" is an agreement that requires the exporting country to limit its exports of the product in question to the country that has imposed the agreement. These agreements may be publicly announced or may be confidential. For a discussion of their legality under U.S. law prior to enactment of the Trade Act, see *Consumers Union of U.S., Inc. v. Rogers*, 352 F. Supp. 1319 (D.D.C. 1973), *aff'd in part sub nom. Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975). An "orderly market agreement," by contrast, is a term of art in U.S. law, meaning a public agreement pursuant to an escape clause action under the Trade Act restraining both exports and imports. See W. CLINE, N. KAWANABE, T. KRONSTJÖ & T. WILLIAMS, *supra* note 33, at 198-200, 204.

usually "agrees" to waive these requirements. "Voluntary" export restraints can be more pernicious still, since they are frequently confidential arrangements that avoid both international and domestic political discipline.⁸⁷

The failure of Contracting Parties to observe the requirements of article XIX is perhaps the basic problem with this article of the GATT.⁸⁸ Congress recognized this difficulty in the Trade Act of 1974, when it directed the President to seek "the revision of article XIX of the GATT into a truly international safeguard procedure which takes into account all forms of import restraints countries use in response to injurious competition or threat of such competition"⁸⁹ The Tokyo Round negotiators have developed a draft integrated text for a safeguards code that builds upon article XIX. This code would eliminate the concepts of retaliation and compensation, which have discouraged the use of article XIX, by tightening reporting requirements and establishing more precise conditions and criteria for invoking safeguard actions. If the provisions of the new code were followed, countries would not normally be expected to suffer retaliation. Although the basic right to retaliate would remain, retaliation would not be presumed to be the appropriate response.

The most important issue of the safeguards negotiations is the use of selective safeguards that lack any most favored nation element. This issue has not yet been resolved. After preliminary sparring, the industrialized countries have agreed to permit some form of selectivity. What remains to be settled are the conditions:⁹⁰ whether import restraints against selected countries will be permitted only with their acquiescence, only with the consent of a GATT review body absent the acquiescence of affected countries, or unilaterally if neither agreement nor international consent can be secured promptly. Positions of the participating countries on these questions tend to coincide with national self-images as beneficiaries or victims of escape clause actions. Because of severe internal political pressure to limit import competition in various sectors, the EEC nations have strongly advocated a flexible selectivity provision. Japan and the developing countries have either opposed the concept or supported it only when it was accompanied by strict conditions on the use of selective actions. It may be from the safeguards negotiations that developing countries have the most to fear

87. A secret voluntary restraint agreement that restricted exports of steel from Japan to the EEC was the subject of a complaint filed by the U.S. Iron and Steel Institute. The complaint alleged that, by diverting steel from Japan to the U.S. market, the agreement constituted an unfair trade practice within the meaning of 19 U.S.C. § 2411 (1976). This complaint was filed in 1976. It is reported at 42 Fed. Reg. 45,628 (1976).

88. Roschke, *supra* note 13, at 94.

89. 19 U.S.C. § 2131 (1976).

90. See Status Report, *supra* note 2, at 7: "the question of how and under what circumstances and conditions a selective application of safeguard measures would be provided for in the code, is still a subject of intensive negotiations."

from the MTN. As some of these nations rapidly improve their export performances in particular sectors, their relative political powerlessness makes them easy targets for selective restraints. The developing countries noted this concern in their formal comment on the Status Report prepared by the industrialized countries.⁹¹

C. DEVELOPING NATIONS

One of the cornerstones of the post-World War II international trading system is the most favored nation principle: "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."⁹² Developing countries have long sought modification of this principle to permit some forms of special treatment for their exports. One result of this effort was the adoption of the Generalized System of Preferences, which allows selected exports from developing countries to enter the markets of developed countries at lower duty rates than those applied to the same products from developed countries.⁹³

But the Generalized System of Preferences is merely one facet of north-south trading relations. Moreover, it only took effect through a temporary waiver by the GATT Contracting Parties.⁹⁴ In the MTN, the developing countries have sought to establish a permanent basis for the Generalized System of Preferences and to broaden the possibilities for special treatment. They achieved a measure of success in this effort at the outset of the MTN by securing recognition in the Tokyo Declaration that "special and more favorable" treatment might be provided in appropriate cases.⁹⁵

A second important gain by developing countries from the MTN may be the adoption of an enabling clause that would make special treatment for the products of developing countries a permanent feature of the international trading system. It would also include a rule of "graduation" from

91. "The Statement by some major trading nations does not adequately reflect certain issues of major concern to developing countries and has omitted others, such as . . . the principle that safeguard actions should not discriminate against developing countries . . ." Statement by Delegations of Developing Countries on Current Status of Tokyo Round Negotiations, GATT Doc. MTN/INF/38 (July 14, 1978) (on file at the *Cornell International Law Journal*).

92. GATT art. I(1), 4 BISD at 2.

93. For an extended discussion of the Generalized System of Preferences, see Graham, *supra* note 43.

94. The waiver by which the GATT Contracting Parties permitted the most favored nation principle to be abrogated for a 10 year period, in order to permit the Generalized System of Preferences to operate, is set forth in GATT Doc. L/3545 (1971), *reprinted in* BISD (18th Supp.) 24 (1972).

95. See note 20 *supra* and accompanying text.

this special status, so that each developing country would take on increasing responsibilities under the GATT when its level of development advanced. Moreover, as the clause is currently envisioned, it would prohibit special deals between developed countries and selected developing nations. Developed countries would have to afford special treatment to all developing countries in similar economic circumstances, which would permit some benefits to go only to the poorest developing countries. The clause would recognize the Generalized System of Preferences as the only legitimate form of tariff preference and subject preferential arrangements among developing countries to greater control under the GATT.

D. DISPUTE SETTLEMENT

Systems of international rules such as the GATT may encourage compliance in at least three ways. First, unless the system is a dead letter, its mere existence influences the policy decisions of member governments, who would be reluctant to violate the system's rules openly. Defiance of the system undermines the common interest that led to its formation. The GATT has played this persuasive role reasonably well over the years, with notable exceptions in the areas of agriculture, subsidies, and safeguards, where the current rules are increasingly obsolete.⁹⁶ One of the primary but unspoken purposes of many parts of the MTN is to assure the system's conformity with the norms of its members so that it can again exercise a degree of moral authority.

Self-policing obviously has its limits. Sovereign governments may choose to violate their international obligations for overriding policy or political reasons. At other times, practices may fall into gray areas where compliance is in doubt, and there will always be situations not provided for by the rules. Thus, as a second means of promoting compliance, members of the system can build an organizational structure and consultative provisions that can adapt the rule system to new circumstances and defuse problems before they reach the confrontation stage. A third means of encouraging compliance is to deal competently with confrontations that do arise over alleged infractions of the rules.

The GATT, a small organization that grew almost accidentally⁹⁷ around a set of contractual rules, has had difficulty adapting to changing realities and anticipating problems other than those involving adherence to its rules. Whether this rigidity will continue depends more on the nature of the GATT institution after the Tokyo Round is concluded than on changes in the GATT rules. Negotiators are currently discussing proposals to ex-

96. See notes 65-91 *supra* and accompanying text; notes 110-28 *infra* and accompanying text.

97. See note 6 *supra*.

pand the GATT Secretariat and give it more responsibility for bringing issues before the Contracting Parties. No specific proposals have emerged, however, and the outcome of these discussions is difficult to predict.

Adoption of nontariff codes, each with its own GATT steering group and consultative provisions, may well increase the ability of the GATT system to avert problems and respond to new circumstances. In the area of dispute settlement, negotiators have paid closest attention to the way the GATT deals with alleged rule violations and other actions that nullify or impair benefits accruing to Contracting Parties. Under current GATT rules, the first step toward resolving such disputes involves consultations between the complaining government and the government against which the complaint is lodged.⁹⁸ If consultations do not resolve the problem, the Contracting Parties review the issue, using a small panel of independent experts or a larger working party of national representatives. The panel or working party conducts a hearing and may attempt to mediate an amicable settlement.⁹⁹ If this is impossible, the group issues a report that may recommend that the offending practice be changed. The GATT rules also authorize trade retaliation against recalcitrant countries. But because of concern that this weapon would start a chain of retaliation that would defeat the system's basic purposes, it has been used only once in the history of the GATT.¹⁰⁰ Since authorized retaliation is not a realistic threat, the principal effect of an adverse finding by a GATT panel or working party is to create international peer pressure against the offending government. Such pressure may have the practical effect of costing the offending country bargaining leverage in future trade disputes or negotiations.

These procedures for dispute settlement have become increasingly ineffective in recent years. They lack specific rules and time limits for conducting hearings, so that the selection of panelists, adoption of procedures, and settlement of the dispute may take years.¹⁰¹ The likelihood of delay is

98. Such consultations may be requested under GATT art. XXII, 4 BISD at 39, which provides only for consultations among the parties to a dispute with a view toward amicable settlement. Alternatively, consultations may be held under GATT art. XXIII(1), 4 BISD at 39-40, as the required first step toward referring the dispute to the Contracting Parties for adjudication.

99. There is disagreement over the extent to which panels should attempt to mediate disputes. Although the GATT has traditionally called its panels "panels of conciliation" in recognition of the fact that the GATT is a consensual body without autonomous enforcement powers, some have argued that the proper role of panels is only to decide whether the complaining party's allegations have been sustained, leaving possible settlement to another stage of the proceeding. In practice the extent to which panels mediate disputes put before them varies from panel to panel.

100. The one case in which trade retaliation took place involved a complaint by the Netherlands against U.S. trade restrictions on dairy imports. The Contracting Parties authorized the Netherlands to impose import quotas upon U.S. wheat exports. *See* J. JACKSON, *supra* note 6, at 172, citing the decision appearing at BISD (1st Supp.) 23 (1953).

101. The DISC dispute, note 68 *supra*, took three and one-half years from the time the complaint was filed until the issuance of the reports by the panels.

increased by the lack of a roster of prospective panelists. Moreover, the legal standards for reviewing complaints have become cumbersome,¹⁰² a problem that is complicated by disagreement over whether mediation or judicial decisionmaking should be the primary means of settling disputes. Negotiators are considering measures to remedy each of these problems with the GATT dispute settlement process: introduction of time limits for each stage of a proceeding; establishment of procedures and creation of a roster of panelists; and clarification of the respective roles of mediation and judicial decisionmaking.

Another limitation on the effectiveness of the article XXIII dispute settlement procedures is that their relationship to the nontariff codes is still unsettled. At present, the codes on subsidies, countervailing duties, standards, and other nontariff subjects contain their own dispute settlement provisions, which resemble those of a reformed article XXIII. But it remains unclear whether the final agreement will retain this approach or provide instead for resolution of all disputes arising under any of the codes in accordance with a reformed article XXIII.

E. OTHER MEASURES FOR GENERAL REFORM

The United States is also urging reform of the international rules on export restrictions and limitations of trade for balance of payments purposes. Like import duties, export restrictions under the GATT must be imposed on a nondiscriminatory, most favored nation basis. They are also limited by the general prohibition against quantitative restrictions upon exports or imports.¹⁰³ Nevertheless, there is no general recognition of their potentially disruptive impact on trade or of the possibility that importing countries may have a right of access to supplies of vital commodities. An American initiative to establish these principles, obviously inspired by the

102. Under article XXIII(1) of the GATT, a Contracting Party may complain on the ground that

any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation

GATT art. XXIII(1), 4 BISD at 39-40.

103. Article XI(1) of the GATT provides:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the *exportation or sale for export* of any product destined for the territory of any other contracting party.

GATT art. XI(1), 4 BISD at 17 (emphasis added).

1973 oil embargo conducted by the Organization of Petroleum Exporting Countries, is still under general consideration.

The existing international rules governing trade-restrictive measures imposed to remedy balance of payments emergencies are no longer adequate.¹⁰⁴ For no apparent reason, the relevant GATT articles permit nations to use only import quotas, rather than tariff surcharges, to deal with these emergencies. These articles conflict with widely held views on trade policy.¹⁰⁵ Moreover, there are no adequate provisions for removing import quotas once they have been imposed, so that many import quotas that are no longer justified remain in effect.¹⁰⁶ Measures to deal with these problems are under consideration in MTN's "GATT reform" section.

F. SECTORAL NEGOTIATIONS

The MTN has focused primarily upon functional areas—standards, safeguards, subsidies¹⁰⁷—rather than upon particular industries.¹⁰⁸ Negotiators can, however, concentrate instead on factors that affect trade in a particular sector.¹⁰⁹ For example, negotiations could explore changes in tariffs and nontariff barriers, as well as investment patterns, in a single industry. Despite congressional endorsement of this sectoral approach, it has been subordinate to the functional approach. An MTN sectors group organized by the United States has produced little in its first three years other than general studies of international trade in electronics, aluminum, and a few other sectors.

The worldwide recession in the steel industry and intense competition between EEC nations and the United States in the aircraft industry within the past eighteen months have given considerably more significance to

104. See, e.g., J. JACKSON, *supra* note 6, at 715-16.

105. A tariff surcharge at least preserves the possibility of continued market access for very efficient producers. A quota, by contrast, is an absolute bar to market access no matter how efficient the producer may be. Accordingly, tariff surcharges generally have been viewed as a less onerous form of import restraint. *Id.* at 711-14.

106. *Id.* at 708-09.

107. See notes 50-53, 66-91 *supra* and accompanying text.

108. This is true to a somewhat lesser extent with respect to tariff negotiations, where each country's negotiators look carefully at the effect of prospective tariff reductions upon important industries, even though the negotiations are not formally or expressly conducted on a sector by sector basis.

109. The Senate Finance Committee Report on the Trade Act of 1974, S. Rep. No. 1298, 93rd Cong., 2d Sess. 220 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, states with respect to sectors:

The requirement for achieving equivalence of competitive opportunities within sectors does not require equal tariff and non-tariff barriers for each, narrowly defined product within a sector, but overall equal competitive opportunities within a sector. The Committee feels that appropriate product sectors would include, among others, such industries as steel, aluminum, electronics, chemicals and electrical machinery, all of which should lend themselves to a sector negotiating technique.

Id. at 79, [1974] U.S. CODE CONG. & AD. NEWS at 7229.

sectoral negotiations. In steel, widespread unemployment and idle capacity fueled protectionist pressures against Japanese exports, making it apparent that an international understanding was the only alternative to a "steel war." The Organisation for Economic Co-operation and Development (OECD) is attempting to establish a Steel Committee under OECD auspices to encourage free trade in steel, provide a means of disseminating information, and coordinate national policies on the steel trade. In addition to watching the progress of these negotiations, MTN participants are exploring the possibility of engaging in sectoral discussions on tariff equalization among the major developed countries for certain products.

With respect to aircraft, delegations are studying the elimination of import duties on aircraft and aircraft parts and of the U.S. duty on repairs performed abroad on U.S. aircraft. The United States wishes to broaden the scope of this agreement to include an understanding limiting predatory aircraft financing practices.

G. AGRICULTURE

Agricultural trade presents some of the most intractable but, for the United States at least, most politically important issues of the MTN. As the world's largest exporter of agricultural products,¹¹⁰ the United States has several objectives: gaining greater access to foreign markets now nearly closed to many important U.S. agricultural exports; obtaining assurances that competition between the United States and other exporting nations for the markets of third countries is reasonably fair; and improving the overall application of the GATT rules to agricultural trade. The EEC member states, by contrast, are large importers of several types of agricultural products,¹¹¹ and a growing exporter of others.¹¹² Other major MTN participants, such as Japan, impose strict quotas on many agricultural imports. They, the EEC, and others might prefer to avoid any negotiated changes in the agricultural area.

Behind the agricultural negotiations lies a largely unsuccessful history of attempts to apply the GATT system to a product sector that has been subject to unchecked economic nationalism in most countries. For example, early in the GATT's operation the United States pushed through a

110. UNITED NATIONS STATISTICAL OFFICE, *STATISTICAL YEARBOOK* 1976, 438-40 (1977).

111. The EEC nations import especially large quantities of "foodgrains," such as wheat, for human consumption and "feedgrains," such as corn, for animals.

112. The EEC nations are growing and ambitious exporters of dairy products (such as Danish cheese), as well as some meats and grains. For a European perspective on agricultural trade policy, see Speech by Finn Olav Gundelanch, Vice President, Commission of the European Communities, before the Symposium on World Agricultural Trade and its Potential for Growth, Kansas City, Mo. (May 18, 1978) (on file at the *Cornell International Law Journal*). In the U.S. view, however, the EEC export drive is a direct consequence of its domestic farm policy, which encourages the production of European agricultural surpluses. These surpluses are then disposed of in the world market by means of substantial government subsidies.

GATT waiver¹¹³ permitting the United States to impose additional tariffs or quotas on agricultural imports that were "interfering with a program of the Department of Agriculture."¹¹⁴ Soon thereafter, the EEC instituted its Common Agricultural Policy, which created a single EEC agricultural system and established trade barriers designed to keep the prices of certain domestic farm products below those of competing imports.¹¹⁵ But because the Common Agricultural Policy has no specific authorization, other parties may allege that the levies imposed on imported goods violate GATT rules.¹¹⁶ Also deviating from GATT principles are the Japanese quotas on various agricultural products¹¹⁷ that were originally imposed for balance-of-payments purposes but have been maintained in spite of unprecedented Japanese trade surpluses.¹¹⁸ The GATT rules contain several other exceptions, almost all of which may be invoked to promote domestic agricultural policies.¹¹⁹

113. Article XXV(5) of the GATT specifies that the Contracting Parties may, by a two-thirds vote, grant waivers from GATT obligations to one or more of their number. GATT art. XXV(5), 4 BISD at 44-45.

114. The waiver, BISD (3d Supp.) 32 (1955), permits the United States to impose tariff surcharges ("fees") or quotas on agricultural imports under § 22 of the Agricultural Adjustment Act of 1933, 7 U.S.C. § 624 (1976). Section 22 authorizes the President, upon recommendation of the Secretary of Agriculture, to impose such quotas or fees upon imports if he determines that such imports are interfering with a program of the Department of Agriculture. See K. KOCK, INTERNATIONAL TRADE POLICY AND THE GATT 1947-1967, 162-64 (1969).

115. The Common Agricultural Policy of the EEC employs a system of "variable levies" and "minimum import prices" to prevent entry of imports at prices lower than those of domestic farm goods. One commentator has concluded that "the [variable] levy tends to isolate domestic markets in compartments of unprecedented impermeability." Dam, *The European Common Market in Agriculture*, 67 COLUM. L. REV. 209, 218 (1967). See generally J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 979-1008 (1977). In the U.S. view, this EEC agricultural system has been used to restrict trade to a much greater extent than has the U.S. authority under section 22, see note 114 *supra*, which is in fact the subject of a formal GATT waiver.

116. See [1977] ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 56 (on file at the *Cornell International Law Journal*). This case originated with a complaint to the Special Trade Representative by the National Canner's Association pursuant to § 301 of the Trade Act of 1974, 19 U.S.C. § 2441 (1976). A copy of this complaint appears at 40 Fed. Reg. 44,635 (1975).

117. These points among others were the subject of intense discussions between representatives of the U.S. and Japanese Governments in late 1977. See Testimony of Ambassador Alan Wm. Wolff, Deputy Special Trade Representative, before the East Asian and Pacific Affairs Subcomm., Senate Comm. on Foreign Relations, Apr. 27, 1978 (on file at the *Cornell International Law Journal*).

118. See N.Y. Times, Nov. 22, 1977, at 51, col. 6.

119. These exceptions, most of which are set forth in article XI(2) of the GATT, permit the imposition of quotas in the following circumstances:

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

(b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;

The Tokyo Round's agricultural negotiations have attempted to address various problem areas: market access for exports, international price and supply stabilization for specific commodities, fair competitive conditions among exporters to third-country markets, and the overall application of the international trading rules to agriculture. The success or failure of the MTN may depend upon the ability of the negotiators to reconcile the differing interests of the participants in each of these areas.

For the United States, a longstanding perception that the American agricultural market is more open than those of major U.S. trading partners makes increased market access for a number of important U.S. farm products politically essential for a successful negotiation. Improving U.S. market access, however, appears to require a fundamental shift in the philosophy of the Common Agricultural Policy. Apparently the only way to improve access to the European market is to secure an EEC commitment to import more agricultural products within the context of the Common Agricultural Policy, since a limit on that policy's basic provisions appears nonnegotiable.

The United States is also concerned by the subsidies other trading nations use to increase exports of their farm products. Such agricultural subsidies, like their industrial counterparts,¹²⁰ give the subsidized products an unfair advantage in the competition for world export markets. The GATT exercises little discipline over agricultural subsidies, specifying only that Contracting Parties "should seek to avoid the use of subsidies on the export of primary products."¹²¹ In addition, subsidies that increase the subsidizing country's exports "shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product."¹²² Not only is the obligation not to subsidize agricultural exports precatory rather than mandatory, but "an equitable share of world export trade" is such an imprecise concept that the provision is

(c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or

(ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

(iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

GATT art. XI(2), 4 BISD at 17-18.

120. See notes 65-77 *supra* and accompanying text.

121. GATT, art. XVI(3), 4 BISD at 26-27.

122. *Id.*

little more than an exhortation. In both the negotiations on subsidies¹²³ and those on agricultural trade, the United States is attempting to strengthen this GATT provision.

In response to these U.S. initiatives, the EEC and other nations are seeking agreements to stabilize the price and supply of certain commodities.¹²⁴ The International Wheat Agreement, which would replace a similar agreement that expired last June,¹²⁵ is a classic commodity agreement that is being negotiated under the auspices of UNCTAD at the International Grains Conference in London.¹²⁶ MTN participants will examine the results of these negotiations to determine whether they have achieved the crucial agricultural balance. The emerging agreement being developed will attempt to stabilize prices within an acceptable range through a system of nationally held reserves, which will be accumulated when world prices are low and released when prices are high. It also will provide for a program of additional measures, such as production controls, that may be undertaken by parties to the agreement in the event that the reserve actions fail to stabilize the market. Although a consensus has been reached on the basic structure of the wheat agreement, many important issues remain unresolved. These include the size of the reserves and individual country shares of them, the price levels that will trigger reserve accumulation and release, and possible assistance to developing countries in financing their reserve shares.

The EEC has argued that because of the close relationship between wheat and feedgrain markets (wheat can be used for feed under certain price conditions), a wheat agreement could have an effect on the feedgrain market. Accordingly, the EEC has sought to formulate an agreement on coarse grains with provisions paralleling those proposed by the EEC for wheat. Most other countries are not willing to undertake commitments to stabilize the international feedgrain markets. The United States already undertakes a number of measures as part of its domestic farm program that contribute significantly to stabilization of the international feedgrain market. But because of the unwillingness of other countries to undertake commitments such as utilization adjustments to help stabilize the market, the United States is also opposed to the conclusion of a feedgrain agreement containing economic provisions.

123. See notes 65-77 *supra* and accompanying text.

124. These commodities include wheat, coarse grains, meat, and dairy products. These arrangements are viewed as multilateral solutions designed to address some of the fundamental problems associated with international trade in specific commodities. Many of these problems, such as price instability, cannot be dealt with in the traditional trade negotiating context—that is, through a reduction in trade barriers.

125. Memorandum of Agreement on Basic Elements for the Negotiation of a World Grains Arrangement, GATT Doc. L/2814 (1967).

126. This conference is known formally as the United Nations Conference to Negotiate an International Arrangement to Replace the International Wheat Agreement, 1971, as extended.

The MTN negotiators are also discussing the possibility of a commodity agreement establishing minimum world prices for certain dairy products. The dairy agreement would create a consultative body under the auspices of the GATT for considering problems in world dairy trade. The moving forces behind the dairy negotiations have been the EEC and New Zealand. The United States, however, has not placed a high priority on these negotiations, because the minimum prices would probably be well below current U.S. domestic support prices for dairy products¹²⁷ and thus would have no direct effect on the U.S. dairy industry.

An international meat arrangement, which would cover trade in live cattle and most types of beef and edible cattle products, is also being considered by negotiators. It would create another advisory council to facilitate consultations and the flow of information about international trade in meat. In its present form, the arrangement would not contain economic provisions.

Finally, the July 13 Status Report describes a possible "general understanding on agriculture" that "could provide a framework for avoiding continuing political and commercial confrontations in this highly sensitive sector"¹²⁸ This understanding would probably begin with the establishment of a GATT consultation committee, which may ultimately produce greater international control of agricultural trade.

H. DEVELOPING COUNTRIES

The goal set by the Tokyo Declaration—that developing countries be granted special and more favorable treatment to the extent appropriate and feasible—has been difficult to develop into specific proposals. Naturally, the developing countries have emphasized the call for special treatment, taking a dim view of the GATT's heavy reliance upon the principle of equal treatment for all nations.¹²⁹ By contrast, the developed countries emphasize that feasibility and appropriateness should be considered in pursuing the goal of special treatment. They regard the more extreme demands to be irritants in an already difficult negotiation.¹³⁰ The July 13 Status Report highlights this polarization, since it was solely the work of the developed country representatives and was answered by a separate, wary statement by the developing nations.¹³¹

The developing countries do, however, appear to have a realistic

127. 7 U.S.C. § 1446 (1976).

128. Status Report, *supra* note 2, at 6.

129. Ibrahim, *Developing Countries and the Tokyo Round*, 12 J. WORLD TRADE L. 1 (1978); Note, *Trade Preferences for Developing Countries: Options for Ordering International Economic and Political Relations*, 20 STAN. L. REV. 1150, 1164-67 (1968).

130. *Id.* at 1170-76.

131. See Statement by Developing Countries, *supra* note 91.

chance of using the MTN to improve their position in the international trading system. First, some of the draft agreements, such as those dealing with product standards and customs matters, call for the developed nations to extend technical assistance to the developing country signatories. Such assistance could eventually be extended beyond the narrow goal of helping the developing nations to comply with the provisions of the agreements.

Second, and perhaps most important, the negotiations have focused on producing an enabling clause, which would explicitly permit some forms of "special and more favourable treatment" for developing countries,¹³² in contrast to the basic GATT principle of equal treatment. Such a clause would have to include a principle of "graduation," to require less developed nations to accept increasing responsibilities under the GATT system as their levels of development increase. Although the enabling clause would provide only the possibility of differential treatment in the future, its importance as a wedge in the strict most favored nation principle should not be underestimated.

Third, several of the MTN codes may grant substantive trade benefits to developing countries. For example, the government procurement code will probably place fewer restrictions on the ability of the developing countries to protect their government purchasing entities from the code's requirements of open bid solicitation, criteria, and award announcements. The code on subsidies and countervailing duties may permit some type of "infant industry" subsidization, which is particularly important to less developed nations. In addition, the safeguards code may encourage the structuring of escape clause actions to minimize the restrictive effect upon exports by these countries.

Finally, apart from obtaining special treatment, developing countries can improve their position in the international trading system by influencing the development of new rules in various areas of international trade, such as subsidies, escape clause safeguards, and dispute settlement. The promotion of fairness in these areas would serve the interests of developed and developing nations alike.

I. RELATIONSHIP OF THE MTN AND THE GATT: CONDITIONAL MOST FAVORED NATION STATUS

As the Tokyo Round draws to a close, one of the fundamental questions that remains unanswered concerns what will happen if some GATT Contracting Parties refuse to join in the final agreements reached by the MTN. The most favored nation principle of equal treatment for all trading nations has given rise in the past to the free rider phenomenon—a nation benefits from duty reductions implemented by other nations under the most

132. Declaration of Ministers, *supra* note 18, at 21.

favorable nation principle, for example, but does not reduce its own duty rate by an equivalent amount.¹³³ This possibility has always discouraged participation in negotiating rounds for those who are eager to avoid incurring international obligations. The Tokyo Round presents the same problem with respect to each of the nontariff codes. After all, why should any country, particularly a developing country that believes it may not be receiving adequate special treatment, join a code and expose its own customs, regulatory, purchasing, or subsidizing entities to new international discipline, if it can receive the same benefits without incurring any cost?

This possibility has led major participants in the MTN nontariff negotiations to adopt the position that the benefits and obligations of each nontariff code would apply only to the code's signatories.¹³⁴ This "conditional most favored nation status" would, however, raise difficult problems if it excluded a Contracting Party to the GATT from the benefits of an agreement. Article I of the GATT requires that unconditional most favored nation status apply between Contracting Parties, and the dispute settlement procedures of Article XXIII permit Contracting Parties to challenge actions that violate GATT rules or "nullify or impair" benefits accruing under the GATT. In view of these provisions, it might be difficult for a Contracting Party to defend the use of conditional most favored nation status against another Contracting Party. At some point, either the GATT's most favored nation principle or the nontariff codes' conditional most favored nation principles will have to yield. In this sense, a rigid application of the conditional most favored nation principle could carry seeds of the GATT's disintegration from a broad based international trading system into a series of lesser agreements, each with differing memberships. This problem is still unresolved.

IV

PROBLEMS AND PROSPECTS

As final negotiations began in the fall of 1978, it was clear that the

133. By application of the most favored nation principle, text accompanying note 92 *supra*, negotiated tariff reductions made by a group of Contracting Parties would be extended immediately and unconditionally to all other Contracting Parties, regardless of whether those other Contracting Parties had contributed equivalent tariff reductions of their own. The strong belief in the U.S. Congress that some industrialized nations had gained such "free rides" during the Kennedy Round led to the specification in the Trade Act of 1974, 19 U.S.C. § 2136(b) (1976), that the President was to deny benefits of new trade agreements or withdraw concessions made under past ones, with respect to any major industrialized country that he determined had not in the current negotiations provided "substantially equivalent market opportunities" for U.S. products as those provided by the United States.

134. Generally speaking, conditional most favored nation status means that trade benefits are extended only to the products of a specific group of countries, such as those willing to undertake the obligations of a particular agreement. Unconditional most favored nation status would be the extension of any benefit to products of all countries, without qualification.

most ambitious trade negotiation in history had come a long way in the five years since the Tokyo Declaration; but it was equally clear that many of the most difficult obstacles lay ahead. If the MTN was to meet its December 15 target date, negotiators would have only sixty days to reconcile widely differing positions on issues such as domestic subsidies affecting trade, selective temporary safeguards, commodity agreements and market access for agricultural products, overall tariff balance, and a host of more technical questions in each of the areas under negotiation.

To add to the pressure, failure to reach agreement by December 15 might jeopardize the entire effort. The U.S. Treasury's temporary statutory authority to waive the imposition of countervailing duties on certain subsidized imports was to expire on January 3, 1979, immediately subjecting to countervailing duties seventeen products that have benefited from such waivers. Imposition of these countervailing duties could have a devastating effect upon incomplete negotiations concerning subsidies and countervailing duties, and agricultural trade. This is particularly true because the Treasury imposed several of the waived duties on products subsidized by the Common Market's Common Agricultural Policy programs. Even if the negotiations were completed on time and the Common Agricultural Policy questions were resolved in such a way as to reverse these U.S. complaints against EEC products, the results could not be implemented for several months. At this writing, the effect of the expiration of the waiver authority on the MTN is still unclear.

Lack of congressional support could render the entire MTN effort futile even if the negotiations conclude on schedule and the issue of the countervailing duty waiver can be solved. Both the Senate and the House of Representatives must approve all nontariff agreements and must in most cases enact implementing legislation for the agreements. It would be difficult to rely on congressional support for the MTN in a time of record U.S. trade deficits and allegations of unfair foreign trade practices. There have been specific unfavorable omens on Capitol Hill. In its waning hours, the 95th Congress passed a rider prohibiting U.S. tariff reductions on textile products, which threatened to set back the MTN by causing other countries to withdraw their offers.

Finally, U.S. policymakers and negotiators have been trying so feverishly to complete the Tokyo Round that they have given little thought to its implications, both for the GATT system and for U.S. trade policy. Adoption of the nontariff codes on a conditional most favored nation basis could considerably reduce the "multilateralization" of trade issues inherent in the GATT system by creating several small rules systems with different memberships. Moreover, neither the GATT organization nor the U.S. trade

policy structure is currently equipped to manage the sharply increased administrative burdens that will result from adoption of the nontariff codes. In fact, the conclusion of the Tokyo Round may be the occasion for needed improvements in both of these areas. Despite all of these difficulties, the potential consequences of failure in the Tokyo Round are so great that, in the words of ECC Vice President Wilhelm Haferkamp, the negotiations seem "condemned to succeed."¹³⁵

EPILOGUE

The Tokyo Round did not formally conclude on December 15, but as 1978 drew to a close there was no longer much doubt among the major participants that agreements covering the subjects discussed in this Article would be reached early in 1979. Progress on all fronts had enabled the United States to reach bilateral understandings, effectively concluding its negotiations with Japan, Sweden, Finland, Switzerland, and Austria, and had permitted virtually complete texts of almost all nontariff subjects, supported by several key delegations, to be produced. President Carter was preparing to notify formally Congress and the public at the beginning of January of his intention to enter into trade agreements in approximately ninety days. Only the details of a balanced tariff agreement, some relatively minor technical matters, and more significant political problems relating to timing still separated the United States and the EEC. Although some difficult points remained, the prospects for successfully concluding the negotiations within a matter of weeks had never looked better.

One problem that would occupy the coming weeks was the need to broaden the base of agreements to include developing countries, most of which still maintained a skeptical distance. It was generally felt that if less developed countries did not join the agreements prior to the convening of UNCTAD V in May 1979, their participation in the MTN would be delayed and endangered.

Perhaps the most delicate set of remaining issues revolved around three aspects of U.S. domestic political processes. First, the expiration on January 3 of the Secretary of the Treasury's authority to waive countervailing duties meant that several European exports benefiting from restitution payments under the politically sensitive Common Agricultural Policy faced possible penalty duties at U.S. ports. After an initial standoff in which the EEC refused to conclude an agreement on subsidies and counter-

135. Unrecorded oral statement of Wilhelm Haferkamp, Vice President for External Relations, European Economic Community.

vailing duties until Congress acted to restore the waiver authority, and U.S. negotiators felt helpless to secure such action from Congress until there was an agreement covering subsidies, the parties resumed work on a *de facto* agreement that all recognized would remain tentative until the ninety-sixth Congress lifted the threat of penalty duties on products for which the waiver had been exercised.

By year's end such a *de facto* agreement existed, and the Administration was preparing to submit proposed legislation to extend the waiver authority. Such a proposal could, of course, become a lightning rod that would attract many other trade proposals, some of them possibly undesirable. In the meantime, the Administration expected to permit importers to post bonds for their potential countervailing duty liabilities, so that the actual collection of penalty duties would not be necessary.

A second issue related to U.S. domestic political processes involved the understandable unwillingness of other governments to implement domestically commitments made in the Tokyo Round until the United States also had implemented nontariff agreements requiring domestic approval and, in some cases, implementing legislation. Memories of good Executive branch intentions that were not accepted by Congress extend as far back as the League of Nations treaty. To meet this problem, many MTN participants clearly indicated that they would not regard the negotiations as formally concluded and that they would not implement their own nontariff agreements until Congress had accepted the agreements presented to it.

Achievement of that congressional acceptance is the third U.S. domestic issue. The three month period following the President's notice in early January of the U.S. intention to sign agreements will be one of intensive consultations with congressional committees and staffs, official private sector advisors, and other segments of the public about the acceptability of the agreements, the legislation that will be needed to implement them, and other changes in U.S. trade laws or institutions that may be needed. It is likely that these consultations will spark a full scale review, and ultimately a reformulation, of U.S. international trade laws. The task of the Administration during this period will be to win acceptance of the agreements, to gain domestic implementation of them in a manner that reasonably carries out their intent, and to direct the reformulation of basic trade legislation that is almost certain to occur.

Even the most widespread and complete acceptance of the Tokyo Round results in the United States and elsewhere will only begin, rather than end, evaluations of the negotiations' ultimate worth. It will take time for new rules and procedures to be tested in operation, both internationally and within member countries. The probable results of the Tokyo Round—a political gesture of support for open trade, somewhat smoother

procedures for handling international trade disputes, modernization and clarification of the framework of trading rules—are fundamentally important but not dramatic. The risk of the Tokyo Round's failure would be dramatic indeed in terms of shrinking international trade and national economies through a public failure of the will to resist economic nationalism. But fortunately, at the close of 1978, this risk appeared to be diminishing.